Supreme Court, U.S.
FILED
JUN 4 1949
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1948

No. 757

GREAT NORTHERN RAILWAY COMPANY and MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILROAD COMPANY, Petitioners,

vs.

PAUL F. LEHMAN et al., and DISTRICT COURT OF THE SIXTEENTH JUDICIAL DISTRICT OF MINNESOTA and HONORABLE E. R. SELNES, as Judge of said District Court.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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Hayward-Court Brief Printing Co., Minneapolis 15, Minn.

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

BRIEF FOR THE RESPONDENTS IN OPPOSITION

MOTION TO DISMISS PETITION.

Respondents respectfully move the court for an order dismissing the petition for writ of certiorari herein upon the following grounds:

I.

The jurisdiction of the United States supreme court is not properly invoked under Section 1257 (3) and Section 2101 (c) of title 28 of the U. S. Judicial Code, for the reason that there is not drawn in question the

validity of a treaty or a statute of the United States; nor is there drawn in question the validity of a statute of any state, on the ground of its being repugnant to the constitution, treaties, or laws of the United States; and further for the reason that no title, right, privilege or immunity is properly or specifically set up or claimed by petitioners under the constitution, or any treaty or statute of the United States.

II.

For the reason that petitioners failed to properly or seasonably propose or raise the question in the trial court or in the supreme court of the state of Minnesota, the claim that the decision and determination below was in violation of the due process and equal protection clauses of the Fourteenth Amendment of the United States constitution. (See Protests of the petitioner Minneapolis, St. Paul & Sault Ste. Marie Railway Company on pp. 71, 72 & 73, of Vol. I of Printed Record, and see Return to Order to Show Cause by the petitioner Great Northern Railway Company, pp. 73 and 74 of Vol. I of the Record in the court below.)

III.

That the proceeding herein is a statutory drainage proceeding, provided for by the legislative acts of the state of Minnesota, and found in chapter 106 of Minnesota Statutes for 1945, parts of which are found in Appendix "A" of petitioners' brief, and now superseded by Chapter 143 of Session Laws of Minnesota for 1947, and no part of said drainage code has been assailed, challenged or brought in question by petitioners as violating any provision of either the constitution of the state of Minnesota, or of the United States, and said statutory provisions have been, in this proceeding construed, interpreted and sustained as valid, and being

sustained by the highest court in the state of Minnesota, such holding is conclusive on the phase of statutory construction.

Houck v. Little River Drainage District, 239 U. S. 254; 60 L. Ed. 266; 36 Sup. Court Rep. 58.

Chicago etc. v. Risty (1928), 276 U. S. 567; 72 L. Ed. 703.

ARGUMENT.

A. With Respect to Lack of Due Process:

1. The original ditch petition was signed by the number of resident owners as required by statute. This has always been the claim of the original ditch petitioners. That fact was alleged in the petition, viz:

> "The undersigned are a majority of the resident owners, or, own more than 51% of the land and area over and through which the proposed ditch as hereinafter set forth will pass and are the owners of land which will be liable to be affected by or assessed for the expense of the construction of said proposed ditch, * * *"

as required by the provisions of the Minnesota drainage code. Petitioners herein knew at all times of this statutory provision, and presumably knew that the allegation was in the petition.

This question (alleged lack of signers on the original petition) was raised for the first time in the Minnesota supreme court. Had there been any merit to it or had the railway petitioners really placed any confidence in that position, rather than urging it at such a late date when in quest for error, their position now might have merited some notice. Had the petitioners raised that objection in the trial court and successfully sustained it, then the trial court would have been required to follow the statute (Chapter 143, Session Laws of Minnesota for 1947, Sec. 10, Sub. 3) and referred

back the petition; and were it not an afterthought, that should have been required. If it was not an afterthought then the petitioners were lying in ambush, and they should not now be allowed to raise it in view of the general appearances made herein by them.

However, as above stated, respondents have always considered, and so now claim, that the original ditch petition herein complies with the Minnesota drainage statute, and has ample signatures even as disclosed by the settled case of the final hearing as herein referred to, on the basis of 51% of the owners over which the main ditch or laterals pass, and even on the proof and files referred to by the railway petitioners in their briefs in the Minnesota court, and that there is a large number over 51%, if the actual and true ownerships are considered and which is a proper basis, and the one upon which the trial court relied and made its finding to that effect on two occasions as referred to in the opinion by the Minnesota supreme court.

We do not know if the printed briefs of the respondents in the Minnesota supreme court are available to this court, but we think it fair to state that in such brief the respondents made clear and convincing analysis of the list of such owners on pages 16 to 27 inclusive of such brief and reference is hereby had thereto, clearly showing whether such owners signed or not, or whether they were non-residents and therefore would not have been counted. This analysis proved very clearly that 41 out of the total of 70 owners signed. In the railway petitioners' search for possible error, and in the search of possible affirmative proof presented an analysis from the viewers' report which was filed by the viewers with the trial court on September 23rd, 1947. The ditch petition was filed on January 8, 1946, which would be the effective date to determine the ownerships and titles.

By that factual situation we submit that the record is conclusive as to the sufficiency of the petition, and that the trial court was well within his powers to determine the sufficiency of the petition in any manner it saw fit and that its specific findings of fact on two occasions that the petition was sufficient and had sufficient signers must stand as against the absence of any denial or challenge, or as against and in the absence of any effort to prove any deficiencies in the petition or lack of signers thereon, and in view of the record, and settled case as wholly lacking the testimony and evidence taken received, and considered by the trial court at the *initial hearing* on the petition and at the *preliminary hearing* as required by statute.

Neither of the railway petitioners ever denied this allegation as to signatures even though two written "protests" were filed by the petitioner Minneapolis, St. Paul & Sault Ste. Marie Railway Company on pp. 71 & 72 of the printed record, and one written "Return of Order to Show Cause" was filed by the petitioner Great Northern Railway Company, setting up several and various objections to the proceedings, wherein both petitioners challenged the viewers' reports as to assessments of benefits and specifically challenged the assessments against the respective petitioners, and challenged the engineer's report and challenged and denied the necessity for the entire drainage project, and the size and capacity thereof, and by the prayer thereof invoked the general jurisdiction of the trial court praying for an order denying the petition; and further the "Return" of the Great Northern Railway Company pleaded for alternative relief that

> "it be given the opportunity of appearing before this court at a later date and offering evidence relative to this proceeding" (See Record p. 74).

Further each of said petitioners appeared generally at the final hearing in said matter (Record p. 120) on the 25th day of October, 1947, and again appeared generally in said court at adjourned hearings on November 10th, 1947; on December 15th, 1947; on December 16th, 1947 and finally again appeared generally in said court on January 10th, 1948 and never did either of said petitioners in said court either orally or by written instrument ever challenge the jurisdiction of the court either over the subject matter or over said petitioners, but on the contrary on each occasion introduced evidence, cross examined witnesses, and introduced affirmative evidence therein by direct testimony of their witnesses, and challenged and resisted every step of proof on the part of the original ditch petitioners on the issues of fact thus raised by the respective "protests" and "return" of said railway petitioners herein.

There are three hearings or appearances required in the trial court in a judicial ditch proceeding; first as provided by Section 106.05; and second by Section 106.07 (wherein evidence must be taken and findings made); and finally by Section 106.24, which is the final hearing.

None of the testimony, evidence or record made before the trial court as to the first *two appearances* or *hearings* was ever incorporated or sought to be included in the "settled case". So far as we are able to construe the so-called "settled case" or "printed record" in the supreme court only purported to cover the "transcript of testimony", at the hearing which

> "came on before the Honorable E. R. Selnes, Judge of the District Court of the Sixteenth Judicial District, in the court room of the Traverse County Court House in the village of Wheaton, county of Traverse, state of Minnesota, at 9 o'clock A. M., on the 25th day of October, 1947" (p. 119 of the record).

Evidence, testimony and matters of fact were presented to the trial court at the initial hearing and presentation of the petition, and evidence and testimony was again presented at the *preliminary hearing* held at the same court house in the same city pursuant to statutory notice, and where several parties appeared as stated in the findings on pages 48 and 49 of the printed record, and at which time Mr. A. M. Hopeman was sworn and testified, and

> "a full hearing was had in said matter and upon the preliminary report of said engineer dated July 15th, 1946, and filed with the clerk herein on July 18th, 1946, and said report of the engineer and the testimony submitted by him, *including the original petition herein,* and the nature and extent of the drainage area and the entire drainage proceeding, was duly considered by the court and the court being fully advised in the premises, and having considered said matter," (Italics ours.)

made the findings of fact found on page 49 of the printed record. The so-called "settled case" does not purport to, nor was any effort made by petitioners to have the testimony at those hearings incorporated therein.

It would indeed seem strange that, after two appearances and hearings before the court where the petition was considered as so stated, and the court having found on two occasions in this proceeding that the original ditch petition is sufficient, and signed by the required number of resident land owners, and thereafter appear generally with specific "protests" and "returns", creating issues of fact for trial, upon which they submitted oral evidence and proof and appeared at five different days at the final hearing in said court under such general appearances that the railway petitioners should be able to successfully assail and challenge the

jurisdiction of the trial court to make the findings and order herein which is sought to be reviewed.

After the original ditch petition was filed herein with the trial court on January 8th, 1946 (p. 13 of the printed record), the Minnesota legislature passed a recodified and comprehensive drainage act known as Chapter 143 of the Session Laws of the state of Minnesota for 1947, to which no reference is evidently made in Appendix "A" of petitioners' brief. We charge no bad faith in such connection, but we think this court should have it under consideration because there are certain provisions thereof that are relevant, and were considered by the Minnesota supreme court, and for the further reason that the proceedings herein are now being conducted under the 1947 code, and we call the court's attention to Section 106.101, Sub-division 3, of the new code, which reads as follows, viz:

> "*Sufficiency of Petition.* The board or court shall first examine the petition and if the petition be found sufficient as required by law shall so find. If the petition be found insufficient in that it is not signed by the requisite number of owners of lands described in the petition, or otherwise, the hearing shall be adjourned and the petition referred back to the petitioners for such action thereon as may be advised. The petitioners, by unanimous action, may thereupon amend the recitals in the petition. They may procure the signatures of additional owners as added petitioners. At the adjourned hearing, if the petition be found insufficient, the proceedings shall be dismissed".

Therefore, the petitioners herein can not under any view seek a reversal of the order and judgment of the Minnesota supreme court or procure a dismissal of the proceedings, but on the other hand, it would appear that the above provision would require at most that the

petition be re-referred for additional signatures, which would only result in delay and no good results would be forthcoming therefrom; and furthermore, the above provision proceeds on the theory that the court *has* and retains *jurisdiction* to act in the premises and *re-refer* the petition and then if it is still insufficient, the proceedings shall be dismissed.

As stated by the Minnesota supreme court in its opinion (pp. 769 & 770 of the record in this court), after setting forth the applicable drainage code, viz:

> "106.25 *Jurisdiction—how acquired.* Upon due publication, posting, and mailing of the notice provided for in Section 106.24 (notice of final hearing), the county board, in the case of county drainage proceedings, and the district court, in the case of judicial proceedings, shall have jurisdiction of each tract of land, all public highways, railroads, and all other property in the engineer's and viewers' reports described * * *, and of each tract of land described in the notice and of each tract of land owned by any of the persons * * * whose name appears in the notice that is affected by the proposed drainage system or laterals, and all persons and corporations, municipal and otherwise, that are named in the notice, * * *"

and the Minnesota supreme court continued, viz:

> "appellants-relators do not question the publication, posting, and mailing of the notice of final hearing. They also appeared generally at the hearing. We then have a situation where the court has twice found that the petition is sufficient; that such findings remain unchallenged; that proper notice of the final hearing was given; that such hearing was had; that appellants-relators appeared generally; and, finally, a statute which states that where proper notice is given as provided for in the statutes the court shall have jurisdiction of each tract of land described in the engineer's and viewers' reports and of all persons and corporations named in the notice."

Another provision of the Minnesota drainage code, Section 106.591 reads as follows:

> *"Records, prima facie evidence.* The record of any proceedings conducted under the provisions of this chapter and of any order made by the county board or the district court in such proceeding, or the certified copy thereof, shall be prima facie evidence of the facts therein stated and of the regularity of all proceedings prior to the making of the order".

In view of the proceedings herein, and order and the record in this case, the Minnesota supreme court has construed the above section as giving the proceedings and orders of the trial court herein prima facie effect, and they must be given that effect until the contrary is shown by a direct attack on the judgment or order. The Minnesota supreme court has acted finally in the construction and interpretation of this proceeding and of the Minnesota statutes involved.

Failure to provide for any opportunity to be heard on the propriety of the inclusion of lands in a drainage district at the time of its establishment does not render the statute under which such proceedings are taken unconstitutional as depriving the landowner of property without due process of law where he is given opportunity to be heard on the *question of benefits and damages.*

Due process does not require that a property owner be given *notice of every step* in proceedings for the establishment of a drainage district.

> *Beck v. Missouri Valley etc. District* (1931), (U. S. C. C. A. 8th) 46 Fed. (2d) 632; 84 A. L. R. 1089; Cert. denied 284 U. S. 618; 76 L. Ed. 527.

And see Annotation: 84 A. L. R. on page 1098.

B. With Respect to Denial of Equal Protection of Law:

The railway petitioners complain that they have not had the equal protection of law in connection with the assessments of benefits against their respective companies. They point out that their railway companies, too, should have been assessed on the basis of acreage the same as the owners of assessed farm lands. Of course, this is an erroneous theory. In assessing the farm lands the Minnesota drainage code seeks to obtain a specific lien on the tract or area of farm lands. As against railroads, and highways, and municipalities, that theory is not applicable at all, and no lien is sought to be obtained against any specific item of their property, or any part thereof.

The provision of the Minnesota drainage code anticipates a different method of assessments between farm lands on the one hand, and property of municipalities and railways and utilities on the other hand. And the drainage code on this point reads as follows:

> 106.151, *Duties of Viewers; properties*: "The viewers, with or without the engineer, shall view all lands and properties benefited or damaged by the proposed drainage system and shall make their report thereon.
>
> Such report shall show in tabular form the description of each lot and forty-acre tract, or fraction thereof under separate ownership, benefited or damaged, the names of the owners as the same appear on the current tax duplicate of the county, the number of acres in each tract benefited or damaged, the number of acres added to any tract by the drainage of meandered lakes and the value thereof, the damage, if any, to riparian rights, and the amount that each tract will be benefited or damaged. * * *
>
> The viewers shall report all benfits and damages that will result to all railways and other utilities,

including lands and property used for railway or other utility purposes.

They shall report the benefits and damages resulting to the state of Minnesota and all counties and other municipal corporations resulting from the proposed drainage system. * * *

The viewers shall find and report the benefits accruing to all lands and properties affected and benefited, whether the same accrue immediately from the construction of the system, or as the same affords an outlet for drainage, makes an outlet more accessible, or otherwise directly benefits such lands or properties."

From the above it is readily to be noted that the method of approach in ascertaining the benefits to farm lands on the one hand, and highways, and railroads, and etc. on the other is different. The statute even requires that farm lands be broken down into 40-acre tracts in anticipation of special ditch liens thereon.

And further Section 106.19 provides, viz:

"When any roadbed, right of way, or other property used by a railroad company for railroad purposes shall be determined in such proceedings to be benefited by any such drainage system *the railroad company* shall be assessed its just proportion of such benefits as in the case of other lands assessed * * * the amount of such assessment with interest shall constitute *a lien against all property* of the railroad company *within such county.*" (Italics ours.)

In the case of

Houck v. Little River Drainage District, 239 U. S. 254; 60 L. Ed. 266

this court said:

"When local improvements may be deemed to result in special benefits, a further classification may be made and special assessments imposed accordingly; but even in such case there is no requirement

to the Federal Constitution that for every payment there must be an equal benefit. The state in its discretion may lay such assessments in proportion to position, frontage, area, market value, or to benefits estimated by commissioners. And, as we have said, unless the exaction is a flagrant abuse, and by reason of its arbitrary character is mere confiscation of particular property, it cannot be maintained that the state has exceeded its taxing power."

In this proceedings the state of Minnesota was assessed by the viewers the sum of $390,000 for benefits to Trunk Highway No. 9, which parallels the proposed ditch for a distance of some sixteen miles. The village of Tintah, as a municipality, was assessed by the viewers herein in the sum of $24,000.00, and of course, it would not be possible to assess the state of Minnesota, or the railways, or the village of Tintah, on the basis of acreage. It must be on the basis of benefits to the municipality or utility.

The petitioning railroads have had, and will have the equal protection of the law. The drainage code provides that if any person is aggrieved by the viewers' assessments of benefits, they have a right to appeal to the district court as a separate law suit, and that in the district court the matter is tried as to each separate owner in a trial *de novo,* and to a jury, and in such trial the only issue will be the amount of benefits that the drainage proceeding can show to the jury will accrue to the land owner, the municipality, or the public utility.

The Minnesota statute provides for such appeal, Section 106.631 which provides as follows:

Subd. 1. *Grounds for appeal.* "Any party aggrieved thereby, may appeal to the district court from an order of the board or court made in any pro-

ceeding and entered upon its record determining any of the following matters:

(1) The amount of benefits determined;

(2) The amount of damages allowed;

(3) Relative to the allowances of fees or expenses in any proceeding.

Subd. 2. *Procedure on appeal.* (a) Any person appealing on the first or second ground named, may include and have considered and determined benefits or damages affecting property other then his own. * * *

(c) The issues raised by the appeal shall stand for trial by jury and shall be tried and determined at the next term of the district court held within the county in which the proceedings were commenced, or in such other county in which the appeal shall be heard, beginning after the filing of the appeal; and shall take precedence of all other matters of a civil nature in court. * * *

Subd. 3. *Effect of determination.* In all cases of appeal, the amount awarded by the jury as finally determined shall stand for and in the place of the amount from which the appeal was taken. * * *

Subd. 5. *Appeal to supreme court.* Any party aggrieved by a final order or judgment rendered on appeal to the district court, * * * may appeal therefrom to the supreme court in the manner provided in civil actions. * * *"

From the above it would seem that the railway petitioners herein not only will have the equal protection of the laws but that before any assessment is made final, it will be following legal procedure and due process of law.

On the appeal in the district court the assessments of benefits by the jury will be entirely anew and will have no connection whatever with the assessments made by the viewers. Indeed, it is improper to inject into the jury trial what the assessment of the viewers was. How

then can the railroads complain of a lack of due process of law? Under the Minnesota drainage code the assessments must be based upon benefits to be received, and that is a fact that must be proved in the jury trial as any other fact by the greater weight of the evidence, and both sides to the controversy having opportunity to be heard, and submit evidence of their respective contentions in the trial court, which is one of full and general jurisdiction.

In this case, as was disclosed to the Minnesota supreme court, both of the petitioning railways have duly appealed from the assessments of benefits of which they now complain, and the appeals are pending for trial by jury in the trial court.

Under the Minnesota drainage code the statute does not propose to set out or prescribe any certain or arbitrary method of determining benefits or damage, but that is left to the judgment and discretion of the viewers.

In this case, the Minnesota supreme court said in its opinion on page 764 of the record as follows:

> "The viewers spent 45 to 47 days examining the parcels of land lying within the proposed drainage system. The testimony of viewer Beeson indicates that their inspection was thorough. He showed by his testimony an unusual understanding of the problems involved in the proposed system as a whole and those which arose in connection with each individual tract * * * The railroad rights of way were assessed on a different basis, as was the state highway right of way. * * *
>
> There may be errors in individual assessments. Such errors, if any, may be corrected on appeal from the assessments. In re Judicial Ditch No. 12, 147 Minn. 290, 180 N. W. 119. They are not before us now. The Great Northern and the Soo Line, who were assessed for benefits in amounts of $150,000 and $50,000 respectively, have appealed from such

assessments. If the viewers erred as to the amounts in these specific cases, of course the opportunity is there for correction."

In such a situation of applicable procedure guaranteed to the railway petitioners by the Minnesota drainage code and the judicial construction thereof, how can they complain in this court that they will not have equal protection of the laws, or that the final assessment of benefits against them will not be the result of due process of law.

One has but to read the record in this case as to the amount of threatened flood and damage from waters to either of these railways (and it was so pointed out in the respondents' brief in the state supreme court), to determine that each of these railways will receive benefits that are almost boundless and scarcely the subject of computation throughout the years to come.

In the case of

Chicago et al v. Risty (1928), 276 U. S. 567; 72 L. Ed. 703

which was a case where this court had occasion to consider the drainage act of the state of South Dakota and whether or not due process of law was accorded the railroad appellant there under the provisions of that code. And this court in sustaining quite similar procedure as under the Minnesota code said:

> "Due process of law does not require notice of a proceeding to determine merely whether an improvement shall be constructed without at the same time establishing the boundaries of the assessment district. It is enough if landowners who may be assessed are later afforded a hearing upon the assessment itself (citing cases).
>
> The state court further held that upon this hearing the land owner may be heard upon the question whether his lands are benefited by the drain-

> age system and the extent of those benefits, if any, or whether the proposed assessment was unjust or unwarranted, and may raise all constitutional objections to the assessment."

This court will not interfere with the assessments in special proceedings on the ground of violation of constitutional rights secured by the Fourteenth Amendment unless the action of the state authorities is arbitrary or wholly unequal in operation and effect,

Goldsmith v. Prendergast, 252 U. S. 12, 64 L. Ed. 427,

and cases therein cited.

In the case of

State of New York v. Edward P. Barker et al, 179 U. S. 278; 45 L. Ed. 190,

it states as follows:

> "A corporation is not denied the equal protection of the laws by N. Y. Laws 1857, chap. 456, No. 3, which, as construed by the highest court of the state, provides an opportunity, in assessing the property of a corporation, to correct an undervaluation first made by the assessors, without giving the same opportunity to correct an undervaluation of the property of individuals, so long as the corporation is not assessed on any property not legally taxable, or taxed beyond the actual value of its property, and there is no proof of any general custom to undervalue the property of individuals."

In special assessment proceedings the legislature may make reasonable classifications and impose a *different* burden upon the several classes, and *peculiar obligations* may be imposed upon a railway in respect of streets occupied by its tracks, and if such assessment is sustained by the highest state court it will not be interfered with here.

Durham Public Service Co. v. Durham, 261 U. S. 149, 67 L. Ed. 580.

In the case of

Miller & Lux v. Sacramento, 256 U. S. 129, 65 L. Ed. 859

this court said:

> "since *Houck vs. Little River Drainage District* (1915), *Supra,* the doctrine has been definitely settled that, in the absence of flagrant abuse or purely arbitrary action, a state may establish drainage districts and tax lands therein for local improvements, and that none of such lands may escape liability solely because they will not receive direct benefits."

C. The Minnesota Courts' Construction of Ditch Drainage Code is Conclusive and Final.

As heretofore pointed out the law involved in this proceeding is local and purely statutory and involves statutory procedure under Minnesota law. We contend that the final construction of the highest court in Minnesota is conclusive, on that point and should be accepted by this court.

In the case of

Chicago et al v. Risty, supra

this very question was involved, and in that case notwithstanding that the lower federal court had construed the South Dakota drainage code, the South Dakota court thereafter arrived at a different conclusion notwithstanding the federal ruling, and in passing on this point of construction this court said, viz:

> "Since our decision in Risty v. Chicago, R. I. & P. R. Co. supra, the supreme court of South Dakota in State v. Risty, — S. D. —, 213 N. W. 952, has had occasion to pass upon the construction and the constitutionality of the South Dakota drainage statutes. Taking a different view from that of this court and lower courts in Risty v. Chicago, R. I. & P. R. Co. supra, it held that the proceedings in-

volved in that litigation and in this, for the assessment of benefits upon lands both within and without the original drainage district, were authorized by the statutes of South Dakota. It held that the action taken for reconstruction of the old drainage ditches was not a proceeding for maintenance or repair of the old system, but a new and independent proceeding, and that the statutes authorized the establishment of a new drainage district embracing all the lands benefited, whether included in the old district or not. It also construed the sections regulating the proceedings for assessing the benefits and costs of the reconstruction and enlargement of the drainage ditches and, as construed, held them constitutional. *This construction of the state statutes by the highest court of the state we, of course, accept.* Sioux County v. National Surety Co. February 20, 1928 (276 U. S. 238, ante, 547, 48 Sup. Ct. Rep. 239); St. Louis & K. C. Land Co. v. Kansas City, 241 U. S. 419, 427, 60 L. Ed. 1072, 1078, 36 Sup. Ct. Rep. 647." (Italics ours.)

D. There is No Federal Question Involved Herein.

As heretofore stated, the constitutionality of a n y state statute, or a Federal statute, or of a treaty is not here involved, and was never raised herein before the trial court or in the Supreme Court of the state of Minnesota. If the petitioners desired to effectively raise the question of constitutionality, that should have been done in their several "protests" and "return" heretofore referred to, but they respectively chose to raise other fact issues which were tried and determined. If the question of constitutionality was involved it was involved from the beginning and it should have been raised, if it existed, in the trial court; and it comes too late when it is sought to raise it for the first time in the petition for re-argument in the state Supreme

Court. The claim that a Federal question is involved must be timely raised and it must be raised at the first opportunity.

Missouri ex rel Missouri Insurance Company v. Gehner, 281 U. S. 313; 74 L. Ed. 871.

In the case of

Brinkerhoff-Faris Trust and Saving Co. v. Hill, 281 U. S. 673; 74 L. Ed. 1107,

this court said:

> "It is true that the courts of a state have the supreme power to interpret and declare the written and unwritten laws of the state; that this court's power to review decisions of state courts is limited to their decisions on Federal questions; and that the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the 14th Amendment or otherwise confer appellate jurisdiction on this court."

The Federal right, title, privilege or immunity must be set up or claimed in the trial court. Whenever, under the state practice, the highest state court in reviewing the judgments of the trial court refuses to consider questions not therein raised no question can be raised thereon in this court.

Baldwin v. Kansas, 129 U. S. 52; 32 L. Ed. 640.

There was no specific Federal question assigned, urged or argued in the state Supreme Court in the case at bar, and the Minnesota Supreme Court did not in its written opinion, pass upon or dispose of any so-called Federal right or claim.

The Federal question must be raised before final decision in the highest court of the state or the United States Supreme Court acquires no jurisdiction.

Winona-St. P. Land Co. v. Minnesota, 159 U. S. 540; 40 L. Ed. 252.

In the case of

American Surety Co. v. Baldwin, 287 U. S. 156; 77 L. Ed. 231.

this court dismissed a writ of certiorari because no Federal question was involved or was not seasonably made, and the court said:

> "The Surety Company petitioned for a rehearing. *In that petition,* besides reiterating several of its previous contentions, it urged, *for the first time,* that the rendition of the judgment on its undertaking violated the due process clause of the 14th Amendment. The petition was denied without opinion. The Federal claim there made cannot serve as the basis for review by this court. The contention that a Federal right had been violated rests on the action of the trial court in entering judgment without giving notice and an opportunity to be heard. The same ground of objection had been raised throughout the proceedings but solely as a matter of state law. There had been ample opportunity earlier to present the objection as one arising under the 14th Amendment. This is not a case where the Federal claim arose from the unanticipated disposition of the case at the close of the proceedings in the state Supreme Court. Nor is the Federal claim based upon the unanticipated act of the state Supreme Court in giving to a statute a new construction which threatened rights under the constitution." (Italics ours.)

In the case at bar there was ample *notice* to the railway petitioners by way of service by mail, by publication and by posting and no claim is made by them that there is any defect in the service of the notice. Pur-

suant to that notice the railway petitioners appeared generally in the proceeding and both were *heard* under a pleading which created and raised issues of fact and they *appealed* from the trial court's decision on those issues to the state Supreme Court. There was nothing surprising or startling about the decision of the state court, but a simple affirmance of the order of the trial court without a modification of any kind. The Minnesota court did not deviate from the well established and adjudicated Minnesota law on that subject.

If there was a *real bona fide* Federal question involved, the railway petitioners should have raised that specific question before the trial court and given it an opportunity to consider and rule upon it. They would then have squarely presented the question, if it had been properly raised in the briefs, to the Minnesota Supreme Court. Now as the matter stands, the Minnesota Supreme Court has never heard and considered it *as in issue in the appeal* and it is not mentioned or referred to in the *opinion* by Justice Magney of the Minnesota Supreme Court. And only in the petition for re-argument did the railway petitioners repetitiously refer to the violation of the 14th Amendment but such petition did not present the issue to the Minnesota Supreme Court and it was denied without opinion. It would be unfair to the lower court and the Minnesota Supreme Court to now inject a *new* and *fresh* issue and seek *reversal* when it had not been properly and squarely presented to the courts below.

In their original printed brief in the Minnesota Supreme Court, the railway petitioners assigned one page thereof to the subject, "LEGAL ISSUES OR QUESTIONS INVOLVED" on page 3 thereof and reference is now had thereto. Six issues or questions were enumerated, but no reference whatever was made to

any constitutional question or that they sought protection under the 14th Amendment of the Federal Constitution.

Then, again, on page 33 of their same brief the "ASSIGNMENTS OF ERROR" are set out and enumerated. There, ten assignments of error are set forth; but again no reference is made to any Federal question or that any protection is sought under the 14th Amendment of the Federal Constitution. So no Federal question, and no alleged violation of the 14th Amendment was urged upon, or considered, or decided by the Minnesota Supreme Court. Under the practice of this court, how then can the petitioners now raise the point in an effort to reverse the Minnesota court? Not only did the railway petitioners fail to urge or raise those questions below, but we again state that *no such Federal questions are involved in this proceeding* and we claim that none can now be successfully injected into the case.

In the case of

Defiance Water Co. v. City of Defiance, 191 U. S. 183; 48 L. Ed. 140,

this court said:

> "Ordinarily the question of the repugnancy of a state statute to the impairment clause of the Constitution is to be passed upon by the state courts in the first instance, the presumption being in all cases that they will do what the Constitution and laws of the United States require, * * *."

Counsel for the petitioners fall into error when they argue that the Minnesota court indulged in presumptions which became conclusive as against their inability to rebut them. They fail to keep in mind that ample opportunities were offered and afforded to the petitioners throughout the entire proceedings in the trial court to raise an issue as to the sufficiency of the petition,

but they omitted to do so, although they did raise other important issues of fact. The Minnesota court held that having failed to raise the issue and having failed to offer any direct proof in attack on the jurisdiction, the presumption carries on and validates the proceeding. To hold otherwise would allow a litigant to reserve an objection and refuse to raise it until met by an adverse result and then seek to raise it to obtain a reversal. Such practice is universally condemned and disallowed.

CONCLUSIONS.

It is therefore, respectfully submitted that the petition for the writ of certiorari herein should be dismissed and/or denied for the following reasons, viz:

1. That the jurisdiction of this court has not been properly invoked.

2. That there is no showing that petitioners will be deprived of the protection of the Fourteenth Amendment of the Federal constitution, or that they will not have equal protection of law, or that any assessments which may finally go against them will not be the result of due process of law and after due notice and hearing.

3. That the due process of law and the equal protection clauses of the Federal constitution were not raised in the trial court, or raised in, or determined by the Minnesota supreme court.

4. That this proceeding involves a purely statutory proceeding under the laws and statutes of the state of Minnesota, and that the construction and the interpretation thereof of the highest court of the state of Minnesota should be accepted by this court; and

5. That no real or substantial Federal question is involved.

Respectfully submitted,

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